

Supreme Court, U.S.

FILED

05 - 44 1 SEP 28 2005

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

Sanjuana Hinojosa, Samuel Hinojosa,
Selena Hinojosa, Corrine Hinojosa,
and Victor Perez,

Petitioners,

v.

State of Michigan, Department
Of Natural Resources.

On Petition For Writ of Certiorari To The Michigan
Supreme Court

PETITION FOR WRIT OF CERTIORARI

Sarah W. Colegrove
Counsel of Record for Petitioner
Todd E. Briggs
Briggs Colegrove, P.C.
1125 First Nat'l Bldg.
Detroit, MI 48226
(313) 964-2077

Mark V. Schoen
Asst. Atty Gen'l
Atty for Respondent
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

QUESTIONS PRESENTED

1. Whether a state legislature has unlimited discretion in shaping the pattern of the state's immunity from liability contrary to the right guaranteed to private property owners by the Takings Clause of the Fifth Amendment that ensures just compensation when property is taken by the public.

2. Whether the Takings Clause of the Fifth Amendment applies when private property sustains actual physical damage caused by a fire hazard which the state failed to abate or allowed to continue.

INTRODUCTORY STATEMENT

On March 19, 2002 the occupied houses located at 2011 and 2101 Lansing Street, Detroit, Michigan were damaged by direct physical invasion from fire that originated from the structure located at 2015 Lansing. The State of Michigan owned 2015 Lansing between May 2, 2000 and March 19, 2002. 2015 Lansing sustained prior fire damage on January 3, 2001 that was never repaired or boarded-up, thereafter leaving the structure open to trespass, vacant, fire damaged and dangerous. The structure was a harbor for vagrants and trespassers who were ripping the wood siding off the structure and using it for fuel in a make-shift hole in the first floor.

**RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

Pursuant to Supreme Court Rule 29.6,
Petitioners state that they have no parent
companies or nonwholly owned subsidiaries.

NOW COME the Petitioners Sanjuana Hinojosa, Samuel Hinojosa, Selena Hinojosa, Corrine Hinojosa, and Victor Perez only, by and through their attorneys, BRIGGS COLEGROVE P.C., and pray that the Supreme Court grant a writ of certiorari to review the judgment of the court below. The Michigan Court of Appeals issued an opinion on September 9, 2004 and the Michigan Supreme Court denied Petitioners' application for leave to appeal on June 30, 2005.

CITATIONS TO OPINIONS BELOW

The order from the Michigan Supreme Court denying Petitioners' leave to appeal is reported at 472 Mich. __; __ N.W.2d __ (2005) (App., *infra*, 19-29). The opinion of the Michigan Court of Appeals is reported at 263 Mich. App. 537; 688 N.W.2d 550 (2004). (App., *infra*, 3-18). The order of the trial court, which ruled against Petitioner is unreported. (App., *infra*, 1-2).

JURISDICTION

The trial court's order was entered on April 2, 2003. A timely right of appeal was filed and an opinion issued by the Michigan Court of Appeals on September 9, 2004. A timely application for leave to appeal was filed and an order denying leave to appeal was entered June 30, 2005. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Constitution provides in relevant part: "not shall private property be taken for public use, without just compensation." U.S. Const. art. V. The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. art. XIV.

The Takings Clause found in Michigan's Constitution states that: "[P]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Mich. Const. art. X, §2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Constitution provides in relevant part: "not shall private property be taken for public use, without just compensation." U.S. Const. art. V. The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. Const. art. XIV.

The Takings Clause found in Michigan's Constitution states that: "[P]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Mich. Const. art. X, §2.

TABLE OF AUTHORITIES

Cases:	Pages(s)
<i>B. & Q. R. Co. v Chicago</i> , 166 U.S. 226 (1897)	4
<i>Buckeye Union Fire Ins. Co. v Michigan</i> , 383 Mich. 630; 178 N.W.2d 476 (1970)	3
<i>Carmen v Secretary of State</i> , 384 Mich. 443; 185 N.W.2d 1 (1971)	2
<i>Herro v Chippewaw Co. Rd. Comm'rs</i> , 368 Mich. 263; 118 N.W.2d 271 (1962)	6
<i>Linda Lingle, Governor of Hawaii v Chevron U.S.A. Inc.</i> , 544 U.S., No. 04-163, decided August 4, 2005	4
<i>Lucas v South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	7
<i>Peterman v Dept. of Natural Resources</i> , 446 Mich. 177; 521 N.W.2d 499 (1994)	3, 6
<i>Pumpelly v G. B. & M. Canal Co.</i> , 80 U.S. 166 (1871)	3, 4, 7

*Tahoe-Sierra Preservation Council, Inc v Tahoe
Regional Planning Agency*, 535 U.S. 302
(2002)6

Constitutional and Statutory Provisions:	Page(s)
U.S. Const. art. V	4
U.S. Const. art. XIV	4
Mich. Comp. Laws § 691.1407(1) (1964)	1

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
Rule 29.6 Statement	(ii)
CITATIONS TO OPINIONS BELOW	(iii)
JURISDICTION	(iii)
CONSITUTIONAL AND STATUTORY PROVISIONS	(iv)
TABLE OF AUTHORITIES	(v)
STATEMENT	1
A. States Are Subject To The Taking Clause.....	2
B. Federal Takings Law	4
REASONS FOR GRANTING THE PETITION	7
INDEX TO APPENDIX	8

STATEMENT OF THE CASE

This case raises an important, recurring constitutional question relating to the Fifth Amendment Takings Clause as well as the nearly identical Takings Clauses found in the Michigan and nearly all other state constitutions. Can a state legislature circumvent or override the federal and state guarantee for just compensation when private property is taken by the public by merely classifying the wrongful action as a "tort" subject to governmental immunity?

It is not contested that each state by virtue of its statehood has the right to exercise the power of eminent domain to take and appropriate lands for roads, canals, state-houses, court-houses, school-houses and many other purposes needed to accomplish the object of governing. It is also not in dispute that each state, as a sovereign, is immune from suit unless it consents to liability and that any relinquishment of sovereign immunity must be strictly interpreted.

The Michigan legislature enacted its governmental tort liability act in 1964. The act was intended to provide uniform liability and immunity to both state and local governmental agencies. The act states that except as otherwise provided, a governmental agency is immune from tort liability if engaged in the exercise or discharge of a governmental function. Mich. Comp. Laws §691.1407(1) (1964). The act sets forth six statutory exceptions to governmental immunity: the highway

exception; the motor vehicle exception; the public building exception; the proprietary exception; the governmental hospital exception; and the sewage system exception.

What is in dispute is the uncontested fact that an actual physical taking occurred because of a tort (in this case a trespass nuisance) caused by a state agency in violation of the federal and state constitutional guarantees. If statutory governmental immunity trumps federal and state Takings Clauses, then the private property owner is left without remedy.

When presented with a federal and state constitutional takings claim, the state appellate courts specifically declined to rule that a tort, which is subject to statutory governmental immunity, "may constitute a constitutional taking." (App., *infra*, 14-15) and left Petitioners without federal or state constitutional protection. In Michigan at least, the state governmental immunity statute supersedes the federal and Michigan Constitutions.

Changing by judicial construction the settled meaning of words aptly used in the Constitution "is more than the exercise of legislative power. It wrests private rights from their moorings, lets down constitutional barriers, and alters the foundation of government." *Carmen v Secretary of State*, 384 Mich. 443, 452; 185 N.W.2d 1 (1971).

A. States Are Subject To The Takings Clause

The limitation on the exercise of the right of

eminent domain is so essentially a part of American constitutional law that it is believed that no state is now without it. Jurists, statesmen and commentators alike have said the when construing a provision of constitutional law, understood to have been adopted for protection and security to the rights of the individual as against the government, the constitutional protection is "beyond the power of ordinary legislation to change or control them." *Pumpelly v G. B. & M. Canal Co.*, 80 U.S. 166, 178 (1871).

The state appellate courts failed to acknowledge that the Michigan Supreme Court had already ruled that the doctrine of sovereign immunity is a creature of the legislature but is still subject to the "applicable and overriding provision of the State Constitution. To that extent, the legislature does not have an unlimited discretion in shaping the pattern of the state's immunity from liability." *Buckeye Union Fire Insurance Company v Michigan*, 383 Mich 630, 640; 178 N.W.2d 476 (1970). The police power of the Michigan legislature is not omnipotent, it cannot, under the guise of regulation, destroy property rights arbitrarily and without reason. *Peterman v Dept. of Natural Resources*, 446 Mich. 177, 190, n 17; 521 N.W.2d 499 (1994).

If the appellate courts construction of the Takings Clause is allowed to stand without oversight by this court, it would pervert the constitutional provision into a restriction upon the rights of the citizen instead of the government, "and make it an